ARGUMENT

THE INTERCEPTION OF THE TELEPHONE CONVERSATIONS OF MINNIE KOHN WAS WITHOUT AUTHORITY.

A. The government argument evidences no such clear authorization as the law demands.

The thrust of the government's case addresses itself to the Court of Appeals establishing two requirements:

1. That Irving Kahn be a party to the conversations, and

2. That his conversations be with "others as yet unknown."

It argues that the statute requiring the order state the "identity of the person, if known, whose conversations are to be intercepted" (18 U.S.C. 2518(4) (a) does not mean the person must be unknown, but means a person is unknown to be in the proscribed enterprise.

It argues that, though the order does not warrant the listening to all conversation made by anyone on the named phones, the statute does not make such limitation, and if the limitation had been intended, it could easily have been included in the statute, but was not.

It further resists the requirements established by the Court below because (p. 24, its Brief):

> The imposition of a judicial requirement for further investigation of other users of the telephone—not needed to justify the fundamental intrusion entailed in placing the tap on the phone—diverts law enforce-

ment resources and, in fast-breaking cases, may cause a fatal delay in obtaining intercept authority. It also places law enforcement officers in the dilemma of having to predict what a court may subsequently say about various questions not necessarily having clear and readily ascertainable answers—*e.g.*: What individuals come within the category of "users" of the phone, who must therefore be subject to investigation? How much investigation is sufficient? If there is some suggestion of possible complicity of such an individual, is it proper to name him as a target in the application (running the risk that a court will later hold that there was not probable cause justifying his inclusion), or should his name be omitted (running the risk that the second guess will lead to the opposite conclusion)?

Generally, we submit, the government's argument is disjointed and tortured. We have endeavored to bring it into some form of plausible coherency, but there are some aspects of the argument that defy such effort. There are some statements that are just beyond our ken, our powers of interpretation, and our ability to divine. They may be commented on hereinafter but they, frankly, are not understood. They are:

The second paragraph on page 10:

> "Although the court of appeals believed that requiring such investigations [or known users of the phones] would protect against unwarranted invasions of personal privacy, such a requirement would not in fact benefit the subject of the investigation, since, regardless of the outcome of the investigation, the individual conversations could properly be intercepted even under the rationale of the court of appeals."

The first paragraph on page 22:

> "Let us consider the question first from the standpoint of the salutary proposition that unnecessary governmental intrusions into the personal privacy of in-

> nocent persons should be minimized. What the court of appeals has required is a thorough criminal investigation of all known users of telephone lines that are the subject of an application for an intercept order—in this case, an investigation of Mrs. Kahn and the two teenage Kahn children. Such an investigation, while undoubtedly lawful, could hardly further the privacy interests of those subject to it, unless it prevents some other, more substantial governmental involvement in their affairs."

and the last paragraph on page 22 going through the first full paragraph on page 23:

> "However, in the present case, the subjects of these additional criminal investigations required by the court of appeals would not derive any such benefits therefrom. If the investigation yields evidence of their complicity, their conversations would unquestionably be subject to valid search and seizure under the court of appeals opinion, simply by naming them in the application and order. If, on the other hand, the investigation failed to disclose evidence of criminal involvement, the individual would then become "unknown" within the order, and the interception of his or her conversations would be similarly validated. In either case the investigation could not lead to any avoidance of interception of the person's conversations."

We do not state the foregoing as any form of disrespect to, or criticism of, our esteemed opponent. We may, in fact, be admitting to our own obtuseness. We do not believe so. But we do point out these examples as illustrative of an untenable position.

This plea of the petitioner to reverse the Courts below relies upon the propriety of a very singular invasion of privacy. This invasion, made under statute at the behest

of the Executive, was to be used with circumspection, and only in the clearest of cases. It would then seem that, to be allowed, the authority therefor should be in the clearest of terms.

Proposing, as the United States must, that this intrusion comes within the authorization of the severely limited statute, the authorization should be clear. We think that the fact that the argument is muddled is the proof that the authorization was not clearly given.

B. Authorized intrusions on privacy are to be strictly construed; are restricted to the clear authority of the order, and what is not expressly authorized is forbidden.

The Government throughout its argument makes reference to the Fourth Amendment. We are not dealing with any Fourth Amendment question here. The Fourth Amendment wouldn't allow phone interception of any kind. Respectfully, we think this authorized interception statute must eventually be found by this Court to be unconstitutional. Dealing, however, as unfortunately we must at this juncture, with the judicial endorsement of this statute, we shall temporarily accept the theory that it is consonant with our Constitution. Accepting, for the nonce, that this is a legal diminishment of the Fourth Amendment, for diminishment it is, we make the following submission to this Court: (1) Any such diminishment is to be closely, not loosely, interpreted. Thus when the Government says, "No valid deterrent objective could be served by application of an exclusionary rule in such circumstances precluding the use of intercepted conversations against persons

not named in the order" (Page 21, Government's Brief), we suggest that the valid deterrent objective is preservation of what is left of the Fourth Amendment. (2) We do not think any intrusion upon privacy is "wholly unnecessary for the protection of individual rights" (Page 23, Government's Brief). It is inconceivable to us that a curtailment of an admitted invasion of individual rights can be deemed wholly unnecessary for their protection. (3) We do not think that the diverting of law enforcement resources (Page 24, Its Brief) is a valid argument here.[1] It was intended that law enforcement resources be extended to their utmost, the conviction of crimes should not be easy. This court made that clear in *United States* v. *DiRe*, 332 U.S. 581, where it said at p. 595:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

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[1] The latter part of the argument of the Government is a great deal of sympathetic appeal, such as: "fast-breaking"; "diversion of law enforcement"; "fatal delays," (p 24, its brief) all the exception in the usually tedious business of law enforcement. There is nothing "fast-breaking" where an F.B.I. agent sits and listens to people's telephone conversations for five entire days, whatever they concern. Remembering, also, that the indictment conversation occurred on the 21st, and no intercept order of Minnie's conversations was ever even sought, the interception nonetheless continued through the 24th.

In this regard, the Government's argument seems to be that the law enforcement officer is not to look to the order of authority, but rather he should carry around the statute book and use his own interpretation as to how far the statute—not the authorization order—allows him to go. Of course, they err.

> "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald* v. *United States,* 335 U.S. 451, 455-6.

Ultimately, in regard to the Fourth Amendment, the Government argues that "Identification of the person or persons whose conversations are to be overheard is not a constitutional requirement." (Page 28 Government's Brief) Neither the Constitution, nor the Fourth Amendment anticipated this intrusion. This intrusion is a deviation from the Fourth Amendment, an erosion of the Fourth Amendment, to which erosion we understand the Executive is not averse. This type of statement is not even spurious. The Constitution talked about intrusion upon a person's person, household, or effects. Nothing in the Constitution talks about his conversations.

Recognizing, as we must, that the Fourth Amendment does not validate wiretapping, only the statute validates wiretapping. Recognizing, as we must, that this intrusion upon Fourth Amendment established rights has but one permissible standard, and that is the Fourth Amendment as limited by the statute, retaining as much of the Fourth

Amendment as is possible under the circumstances,[2] we must also recognize that the Fourth Amendment—even with the incroachment—has as its object the protection of the individual, the following arguments of the Government are senseless:

> **"Although the Court of Appeals believed that requiring such investigations would protect against unwarranted invasions of personal privacy, such a requirement would not in fact *benefit the subject of the investigation*, since, regardless of the outcome of the investigation, the individual conversations could properly be intercepted even under the rationale of the court of appeals." (Page 10, Its Brief)**

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[2] We believed it had been surely recognized by this Court that the Constitution conferred the right to be let alone, the right of privacy. *United States* v. *Lefkowitz*, 285 U.S. 452, 464. However, in *Katz* (389 U.S. 347 at 352) this Court apparently holds that the general right to privacy is the main concern of the individual states. This case leaves us with confusion as to how that concern is to be gratified in federal cases, especially as it relates to privilege. Illinois is conscientious in that concern:

Chapter 38, Sect. 155-1 Ill. Rev. Stats. provides in part:

> "In all criminal cases, husband and wife may testify for or against each other: provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person or property of the other, or in case of wife abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other."

Title 18 U.S.C. §2517(4) gives but lip service to the State's concern:

> No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

But where are these concerns vindicated?

Even if we could understand the import of such a statement we do know that the necessary implication is that the subject of the investigation is regarded as the interest of government to be served, as against the limitation of intrusion or invasion of personal privacy. With such an approach, we do not wonder that personal liberties and privileges outlined by the Constitution are deemed a matter of no consequence, and thus an affront to all liberty-respecting persons.

The Government takes the approach that unless the "order" of the authorization explicitly rejects the intrusion, then the intrusion is allowed. Thus it argues: "there is nothing in either the order or the application to suggest that the District Judge intended to restrict the authorization more narrowly than the statute requires." (Government's Brief, pg. 11)

In accordance with the Government's approach that what is not precluded by the order is included in the order—contrary to every Fourth Amendment concept—is its statement that: "[T]here is no more reason to find that the order intended to preclude the interception of Mrs. Kahn's conversations, simply because she was a known user of the target telephones, than there is to conclude that the statute requires that result." (Pgs. 25-26, Its Brief)

The approach is contrary to all our principals of intrusion upon privacy, or other constitutionally endowed rights. Only that which is expressly authorized is tenable. What is not expressly authorized is forbidden.

C. In evaluating rights, no distinction is made between the innocent and the culpable.

Permeating the Government's entire argument is a tacit concept that wholesale eavesdropping, once an intrusion has been authorized, is the norm, because once the intrusion is authorized innocent conversations will never be made

the subject of criminal charges. Therefore, according to the Government's reasoning, the innocent are not offended, and criminality wherever and however found is the "subject of the investigation" and it would "pointlessly impede" effective law enforcement if the intruder were not allowed to listen to everything to determine for himself whether it was innocent or culpable. Thus the Government does not speak of the minimization of interception of conversations—it speaks only of "the minimization of *innocent* conversations". Intrusion then is not to be limited if the conversation has possible culpability. The Court will note how often the term is used in the brief: "The minimization of *innocent* conversations" (Page 11, Its Brief); "Congress protected the right of *innocent* users of the target telephone" (Page 15, Its Brief); "Overhearing of *innocent* conversations all to be minimized" (Page 15 Its Brief) "Neither respondent has been injured by the overhearing of *innocent* conversation." (Page 16, Its Brief)

What the Government does not say, but what is absolutely implicit in its argument is that no conversation can be deemed innocent until it has been heard, and thus the overhearing cannot be minimized. What the Government also does not say is, if determined to be innocent, there will be no occasion for a motion for suppression. It is patent that you cannot know whether a conversation is innocent or guilty unless you listen indiscriminately, as happened here, and as the Government is urging this Court to endorse.

What the Government also does not recognize is that civil rights were made to protect the guilty as well as the innocent from their being victims of crimes by their Government. As though fearing the concept will be forgotten, this court has repeatedly reminded that this guarantee extends to the innocent and guilty alike. *McDonald* v. *United States*, 335 U.S. 451, 453.

> "The protection of the 4th Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent." *Agnello* v. *United States,* 269 U.S. 20, 32.

Generally, only the accused invoke this constitutional prohibition, and, as Mr. Justice Frankfurter observed, dissenting, "criminals have few friends." *Harris* v. *United States,* 331 U.S. 145, 156.

Thus, the government's preoccupation will stimulate popular appeal, but legally and constitutionally, it must fail.

D. An intrusion is good or bad when it starts, and it does not derive its character from the extent of its success.

The Government's constant arguments about there being a direct analogy here to a Fourth Amendment search of premises is inept, as we discussed before. Several reasons exist for this, not the least of which is that the specific fruits or instrumentalities of crime must be sworn to be in existence in order for a conventional search warrant to issue. There must also be reasonable cause to believe that the instrumentalities or fruits—already in existence—will be found on specified premises. This illustrates, again, the total disinvolvement of the conventional Fourth Amendment search from this type of activity. Search is not being made by eavesdropping for the fruits of a crime nor its instrumentalities already in existence, nor even for evidence of the crime which is already in existence. Searches are here being made for the commission of a future crime.

But these distinctions aside, we invited the Court to examine the Government's argument:

> "Thus, in the context of a conventional search, if there is probable cause to believe that one occupant of

> an area to be searched is engaged in criminal activity and that specifically described evidence is likely to be found there, a warrant can be obtained under which the premises may be searched and property constituting contraband or evidence of a crime seized; ownership of the property is irrelevant." (Page 17, Its Brief)

They are wrong. Ownership of the property is relevant. *United States* v. *Rachel*, 7 Cir. 360 F.2d 858, 860.

The Government argument continues:

> "[I]t cannot be transmuted into a requirement for investigation of other persons (whose complicity also could not be established without the interception of communications)." (Page 19, Its Brief)

If we are going to relate the electronic intrusion to a search, this type of intrusion is definitely forbidden. This demonstrates the search for crime prior to any reason to believe that a crime has been, or is about to be, committed. This is the age-old prohibition against search before arrest; search before charge. This is the age-old prohibition against the fruits of the search justifying the search itself.

> "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *DiRe*, 332 U.S. 581, 595, citing *Byars* v. *United States*, 273 U.S. 28 as one of the frequent occasions.

Finally, at Page 31, the Government, by its footnote 22 attempts to elucidate its position by an analogy to the conventional search and seizure situation and states:

> "If officers having a valid warrant for the arrest of Mr. Kahn had entered his house lawfully to execute the warrant, but while doing so had unlawfully ar-

> rested Mrs. Kahn, searched her, and discovered evidence incriminating both, such evidence would be admissible against him, notwithstanding the fact that the unlawful conduct took place inside his house, since the illegality would not relate to the entry into the premises, but to the violation of a right entirely personal to her."

It is conceivable that a more inept analogy could have been made, but we are unaware how. Especially is this true in the light of this Court's decision in *United States* v. *DiRe*, 332 U.S. 581, where this Court remarked at 587:

> "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had been issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?"

But again, even aside from the same Government having heretofore disavowed such a consideration, we submit to the Court that if there were a search conducted purportedly incident to the arrest of Mr. Kahn in the hypothetical situation set forth by the Government, and that search incident to arrest extended beyond permissible bounds, Mr. Kahn

had all the standing in the world to contest it. What the Government does not seem to recognize is that the purported authority of search incident to arrest—even if overextended—continues to be the purported authority, and Mr. Kahn has every right in the hypothetical situation to move to suppress the overextended search because the authority for the search was personal to him.

The Government seems to think that a wholesale invasion of the home at which the telephones were installed was perfectly compatible with the right of privacy. Thus it argues:

> "An ample showing of probable cause was made to justify the intrusion into the Kahns' privacy, and the interception was conducted in conformity with the court's authorization." (Government's Brief, Page 21)
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> "Since Mr. Kahn could hardly be assumed to be invariably at home and available someone else would be expected on occasion to receive calls relating to the business on those telephones." (Government's Brief, Page 26, Fn. 18)

This argument runs head-long into established authority, and cannot prevail.

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. *True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.* Such constitutional limitations arise from grievances, real or fancied,

> which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." *United States* v. *Kirschenblatt,* 2 Cir., 16 F.2d 202, 203. (our emphasis)

Cited with approval by this court, *U.S.* v. *Lefkowitz,* 285 U.S. 452, 464.

But let us assume that the government rationalizations were presented to the trial judge. Let us assume that the trial judge was informed that now that he had been given what he considered probable cause for believing that Irving Kahn was conducting an interstate gambling business, the Government had said "since you have given us this order we think this justifies our listening to any conversation on the telephone even though there are four known occupants of that house," and what if they had further said "we know Irving isn't going to be on the premises all of the time, so you obviously expect us to listen to any conversation by any one of the four known occupants or otherwise." If issued, it seems quite obvious to us that the authorization would have been illegal.

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley* v. *Georgia,* 394 U.S. 557, 572 (Black, J. concurring)

We cannot allow the Constitutional barrier that protects the privacy of the individual to be hurdled so easily. *McDonald* v. *United States,* 335 U.S. 451, 455.

The principle is illustrated by two Seventh Circuit cases, *United States* v. *Foust*, 461 F.2d 328, and *United States* v. *Dichiarinte*, 445 F.2d 126, analogizing a consent entry to the authorization here. In *Foust* a policeman working as a guard in a school cafeteria saw the defendant and knew he was not a student. The guard's suspicion was also aroused because "an envelope commonly used to transport government checks" was protruding from the defendant's coat pocket. 461 F.2d at 329. Determining that the person the defendant was allegedly there to visit was not registered as a student, the guard ordered him to empty his pockets. The defendant produced identification with one name, gave the officer another as his own, and had a government check payable to a third person. Because the guard "had to examine the envelope in order to ascertain its contents," the court characterized his actions as "the classical type of prying into hidden places which constitutes a search. . . ." *Id*, at 330. Since a warrant had not been obtained, the search was unconstitutional.

In *Foust* there was no issue concerning the initial intrusion by the guard—the questioning of the defendant. *Dichiarinte* involved a similar initial undertaking, the search of a home with the defendant's consent. As in *Foust*, however, the search finally exceeded allowable bounds when the agents, who had been invited to search for narcotics, commenced an unrelated search and found documents that led to the defendant's indictment for income tax violations. The court stated:

> "A consent search is reasonable only if kept within the bounds of the actual consent. Honig v. United States, 208 F.2d 916, 919 (8th Cir. 1953). . . . In the case before us the defendant's consent set the parameters of the agents' conduct at that which would

reasonably be necessary to determine whether he had narcotics in his home. But the agents went beyond what was necessary to determine whether defendant had hidden narcotics among his personal papers; they read through those papers to determine whether they gave any hint that defendant was engaged in criminal activity. This was a greater intrusion into defendant's privacy than he had authorized and the fourth amendment requires that any evidence resulting from this invasion be suppressed."[4]

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[4] The fact that the defendant submitted to a degree of intrusion upon his privacy by permitting the agents to enter his home and rummage through his personal property does not mean that the much greater intrusion on his privacy resulting from government agents' reading his personal papers must automatically be allowed. *See* Chimel v. California, 395 U.S. 752, 766-767 n. 12, 89 S.Ct. 2034, 23 L. Ed.2d 685 (1969), (461 F.2d at 29-30.)

These cases reject the principle that once obtaining possession lawfully, there is no constitutional limit on examination, just as this Court rejected the same principle in *Chimel* v. *California*, 395 U.S. 752, and *Terry* v. *Ohio*, 392 U.S. 1.

It is in the spirit of this unfortunate further espousal of this rejected principle that the Government argues:

> "In the instant case, a careful investigation of Mr. Kahn's activities had disclosed reliable information that his home telephones were being used in connection with the conduct of an unlawful gambling enterprise." (Page 23, Government's Brief)

Thus, the full scope of the Government's tortured argument manifests itself. A careful investigation of Mr. Kahn's activities did not disclose that his home telephones were

being used. It disclosed that he was so using them. A telephone is of itself a faultless thing. It is the person who makes the faultless thing an "instrumentality of crime", and it is people, not places and things, that the Fourth Amendment protects. *Katz* v. *United States,* 389 U.S. 347, 351.

The initial justification for the wiretap authorization was the activities of Irving Kahn, not Minnie—nor their two children.

It is firmly established that a search can only remain allowable if each part of the procedure is reasonably related in scope to the justification for its initiation. *Terry* v. *Ohio,* 392 U.S. 1, 30; *Sibron* v. *New York,* 392 U.S. 40, 67.

It is pertinent to remind that "The genius of our liberties holds in abhorence all irregular inroads upon the dwelling houses and persons of the citizen, . . ." *Luther* v. *Borden et al,* 7 How (48 U.S.) 1, 66.

2. The congressional requirement that normal investigative methods be used or be demonstrated to be implausible is not a mere formality.

The Government says at Page 5 of its Brief that "The Affidavit also noted that all of the informants had stated that they would refuse to testify, . . ." About this, we could only refer the prosecution to the fact that the grant of immunity was obviously not entertained. This much used, and abused, device is apparently not applicable to Government informers who are favored, allowed to continue their alleged illegal business, and who constitute the anonymous foundations for the Government's affidavits to secure orders permitting invasion of privacy, which, but for this statute, would be outlawed by the Fourth Amendment.

The Government continues, "[T]hat physical surveillance and seizure of any records of Irving Kahn would be unlikely to furnish useful evidence." (Page 5, its Brief) Those who have served time for the violation of the now defunct Title 26, U.S.C. §4411 and §4412 would be amazed to find that the surveillance of them and the seizure of their records produced "useless" evidence.

Continuing, in apparent approbation of the dissent of Judge Stevens in this case, the Government indicates that Judge Stevens, "Also pointed out that 'there is nothing in the record to support an inference that the Government should have known that Minnie Kahn * * * would use Irving's telephones to transmit gambling information to a third person while he [Irving] was out of town." (Page 9, Its Brief)

We consider this an utterly and completely misleading statement. The Government, with any kind of investigation, "should have known that Minnie Kahn would use Irving's telephones" since she lived in the house maintaining the telephones, and that Minnie used "Irving's" (if a house phone could be called that of the father of the house) telephone, whether he was in town or out of town. When she used that phone—with the Government's knowledge that she would use that phone—the Government knew it had no right to listen, because their "normal investigative efforts" had divulged no information about Minnie Kahn being any kind of a lawbreaker.

The Government also says that—and we have some trouble with this labored reasoning—that a thorough investigation that the statute required before using this unusual invasion of privacy would in fact be an invasion of privacy stating:

> "What the court of appeals has required is a thorough criminal investigation of all known users of telephone lines that are the subject of an application for an intercept order—in this case, an investigation of Mrs. Kahn and the two teenage Kahn children. Such an investigation, while undoubtedly lawful, could hardly further the privacy interests of those subject to it, unless it prevents some other, more substantial governmental involvement in their affairs." (Government's Brief, Pg. 22)

What we think they are trying to say is that the normal investigative procedures required by the statute (18 U.S.C. §2518(3) (c)), i.e. surveillance, would offend the privacy of the person known to be using the phones, whereas a surreptitious invasion of the "uninvited ear" (*Katz* v. *United States,* 389 U.S. at 352, 353) is less offensive. Surveillance is a normal investigative procedure. How, then, with the admission that the surveillance was not employed, is it possible the Government advances to this Court the finding of the District Court that "(c) Normal investigative procedures reasonably appear unlikely to succeed and are too dangerous to be used" (p. 5, Its Brief)? How, on an admission that the normal investigative procedures have not been used, is an endorsement of such a finding advanced? What was "too dangerous" about a normal surveillance of Irving Kahn, Minnie Kahn and two school age children?

The confusion of the Government's Brief becomes readily apparent when it engages in some of its hypothetical postulants. At Page 5 of its Brief, it is indicated that "seizure of any records of Irving Kahn would be unlikely to furnish useful evidence." At Page 29 it suggests to this Court: "Suppose a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for records of the illegal gambling operation, and the search had produced records in Mrs. Kahn's handwriting."

Is this Court to believe that what could not happen on one hand, makes a basis for argument on the other hand?

The Court will note that the Government makes quite a point of the fact that Judge Stevens said the requirements of exhaustion of normal investigative techniques in advance of application for the wire interception order under §2518(3)(c) had been met. (Government Brief, Page 9) That can hardly stand in the face of the acknowledgement that normal investigative techniques had not even started, much less have they been exhausted.

The Government demeans the decision of the Court of Appeals, (Page 16, Its Brief) where it says:

> "[T]he court of appeals read the statutory requirement that the order disclose the 'identity of the person, if known, whose communications are to be intercepted' (Section 2518(4)(a) as if it included all known users of the phone who might have been discovered to be implicated in the offense by a more thorough investigation—i.e., as though the statute read 'the identity of all persons known or discoverable.' "

We submit to the Court that "known" overcomes "discoverable". "Known" is known. The Court of Appeals said that if normal investigative procedures would have discovered an activity, then that person was known. The Government further demeans the Court of Appeals decision when it says at Page 16:

> "Even if the Court of Appeals' interpretation were correct, there has been no finding by the district court that Mrs. Kahn's complicity should have been known."

It uses this as rather the touchstone of its erratic argument. But the statute (Title 18, USC, Section 2518(1)(b) (iv)) requires the inclusion of "the identity of the person . . . committing the offense."

It continues to argue: "[W]hen there is probable cause to believe that a particular telephone is used to commit the offense but no particular person is identifiable, a wire interception order may properly issue." (Page 14, Its Brief) We know no authority for such a statement, but here certainly the argument isn't applicable. They did know a particular person. That person was identified.

Thus in *Katz* (389 U.S. 347) this Court made a special observation that any persons other than Katz were not listened to. Here Irving Kahn was identifiable. He is in the position of Katz, and Minnie Kahn is in the position of those other persons using that public phone, whose conversations were not intruded upon.

3. The authorities submitted all militate in favor of affirming the decision on review.

We think the authorities advanced by the Government in support of its position are inapplicable or support the respondents' position. Discussion of those authorities follows:

We do not see that *United States* v. *Fiorella,* 2 Cir., 468 F.2d 688, is in any way applicable to this case. It merely stands for the proposition that "and others yet unknown" in the authorization order does not, of itself, constitute a general warrant. The case does, however, repeat the proposition that the order, under 18 U.S.C. §2518(4)(a), requires the naming of the person, if known, whose communications are to be intercepted. (468 F.2d at 691)

United States v. *Cox,* 10 Cir., 449 F.2d 679 concerned only whether knowledge of a bank robbery, obtained under an authorized wire-tap to determine violation of the narcotics laws, could legally be used. It is of no assistance

here since the court found itself "at liberty to presume that all of the proceedings followed were in accordance with the statutes since the defendant does not find fault with these occurrences." This case found only that 18 U.S.C. §2517(5) was not unconstitutional on its face.

The government advances—obviously as its most heartening authority—that *United States* v. *Cox*, 8 Cir., 462 F. 2d 1293 stands for the proposition that "interception of all communications over the designated telephone during the designated period was proper." (p. 28, fn 20, Its Brief) It is our interpretation of the case that it does approve indiscriminate overhearing on the shabbiest of pretexts (see 462 F.2d at 1300-1). And its theory has a complement—totally inacceptable:

> "If appellants, and the unindicted persons whose conversations were overheard, have any remedy under Title III other than the suppression of conversations outside the warrant's scope, it lies in § 2520 as a civil suit against the investigating officers alleging that they exceeded their authority." (462 F.2d at 1301-2)

The reasoning of the 8th Circuit eludes us. It says just prior to this that only innocent statements are suppressable. Further, it does not enlighten us on the forum where unindicted co-conspirators should seek suppression. What we think the Court is saying is that suppression of culpable, or even evidentiary statements, is ruled out, and that only a civil remedy exists. Congress has not said that, even though it has expressly provided a *civil* remedy under Title III, it is exclusive. Even were we to make the wholly unnecessary inference which the Eighth Circuit implies, that Circuit runs head-long into this Court's decision in *Trupiano* v. *United States*, 334 U.S. 699, which

stands for the proposition that the Fourth Amendment bars the use of evidence outside the warrant's scope, be it innocent or culpable.

In *Katz* v. *United States,* 389 U.S. 347, the agents confined their surveillance to the brief periods during which Katz used the telephone booth, and for the purpose of establishing Katz's unlawful telephone communications. (389 U.S. at 254). In the same case, the government also urged that a magistrate would have issued an authorization if it had been informed among other things "of the precise intrusion it would entail." (389 U.S. at 354). This court tacitly agreed, but condemned the omission of this necessary step.

Berger v. *United States,* 388 U.S. 41 speaks with derogation of an order used as a "passkey to further search." (388 U.S. at 57). It also condemns the "roving commission" to seize any and all conversations (388 U.S. at 59) but more, it condemned exactly what the government urges this court to endorse, the absence of particular description of "the 'property' sought, the conversations, . . ." (388 U.S. at 59)

Coolidge v. *New Hampshire,* 403 U.S. 443, so heavily relied on by the government, makes concisely the point that we here have taken these many pages to do. The government urges the analogy of the "plain view" concept. *Coolidge* makes it clear the government's analogy must fail. *Coolidge* spells out the two limitations on the doctrine: 1. Plain view *alone* is never enough to justify the warrantless seizure of evidence; and, 2. The discovery of evidence in plain view must be inadvertent (403 U.S. at 469). Both limitations fail here.

4. Criminal defendants are disadvantaged by arbitrarily continuing suppression of court files.

In respect of the report made to the District Court Judge who issued the interception order, the government states:

> "The first status report, filed with Judge Campbell on March 25, 1970 (A. 26-28), indicated that the interception had been terminated because the objective had been attained. It gave a summary of the information obtained from the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife in Chicago and discussed gambling wins and losses. On the same date, Mrs. Kahn made two telephone calls from the intercepted telephones to a known gambling figure and discussed numbers and amounts of bets placed and the identification, by code, of the bettors." (Pages 6 and 7 its Brief)

This report is found at A. 26-28. The Court will notice that this was suppressed. This report made no part of the record in either of the Courts below.

This is the first time respondents or their counsel have had any information of what was reported to the district court judge authorizing the order. The file, itself (U.S. Dist. Ct. N.D. Ill., E.D. No. 70 C 673) continues to be unavailable to the respondents, except to the extent that the government's interests dictate divulgence.[3] We can

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[3] Neither the file nor the docket are attainable through regular processes in the office of the clerk of the court. Neither do we know if the application for his interception order was properly authorized by the congressionally designated executive.

appreciate an initial desirability for secrecy, but certainly none exists at this time, except to frustrate comprehensive exploration.

Thus is demonstrated the soundness of the observation of Mr. Justice Frankfurter, in his concurring decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." (341 U.S. at 170).

With this unwarranted secrecy, the respondents are left to speculate about basic questions, like whether Minnie Kahn had the notice served on her, as required by 18 U.S.C. §2519, the determination of which question could, of itself, resolve this case against the government.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals, insofar as it suppressed the intercepted phone conversations of Minnie Kahn, should be affirmed.

Respectfully submitted,

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